

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMMIE STOKER

Claimant

VS.

DUSTROL, INC.

Respondent

AND

EMPLOYERS MUTUAL CASUALTY CO.

Insurance Carrier

Docket No. 1,065,785

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 24, 2013, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. Brian R. Collignon of Wichita, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant suffered personal injury by accident arising out of and in the course of her employment with respondent. Further, the accidental injury was the prevailing factor causing claimant's injury, medical condition, and disability. The ALJ ordered respondent to provide temporary total disability benefits and medical treatment with Dr. David W. Hufford. Respondent was ordered to pay claimant's medical bills related to the accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 20, 2013, Preliminary Hearing and the exhibits, and the transcript of the July 31, 2013, Discovery Deposition of claimant, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant's injuries from a May 20, 2013, motor vehicle accident did not arise out of and in the course of her employment but rather arose from idiopathic causes. Respondent argues idiopathic causes are not compensable under K.S.A. 2012 Supp. 44-508(f)(3)(A).

Claimant contends the ALJ's Order should be affirmed as she has met her burden of proving compensability. Claimant maintains the uncontroverted factual and medical evidence proves she fell asleep behind the wheel, which, according to *Roush*,¹ does not constitute a personal or idiopathic risk.

The sole issue for the Board's review is: Did claimant's injuries arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant was hired by respondent for seasonal employment as a flagger, stopping traffic and driving a pilot car. Claimant's other regular duties included pulling and setting up signs and traffic cones at respondent's construction sites. Claimant testified she would leave her home in Wichita, Kansas, and drive approximately 45 minutes to respondent's facility in Towanda, Kansas. Claimant reported for work in Towanda each day by 5:00 a.m., when she and her coworkers would obtain a company vehicle and travel together to an assigned work site.

Claimant's position required long work hours, at times in excess of 70 hours per week. The position required travel and on occasion lodging in hotels while on the job. Claimant testified she was "really tired from the week before," and she informed a supervisor the morning of the accident that she did not feel she could drive to the work site.² Claimant stated a coworker drove to the work site from Towanda, Kansas, on that day.³ Claimant testified she had no breaks between 5:00 a.m. and 2:00 p.m. on May 20, 2013, with the exception of one five-minute bathroom break.

During the afternoon of May 20, 2013, claimant was driving a pilot car at a job site on U.S. Route 77 near Marion, Kansas, when she crossed the center of the road and collided with a tractor-trailer. Claimant testified she has no recollection of the collision, nor did she know whether she fell asleep. She did recall in detail all events subsequent to the accident. The driver of the tractor-trailer provided a written statement to the Marion County Sheriff's Office:

I was parked north bound at waiting spot on US 77 & just south of 140th. Waiting at spot, 2nd in line for pilot car to come & turn around, the pilot car never stopped, impacting my [truck] on the front (left side), missing flag girl & Buick parked in front

¹ *Roush v. Rent-A-Center, Inc.*, No. 1,062,983, 2013 WL 1876358 (Kan. WCAB Apr. 15, 2013).

² Claimant's Depo. at 12.

³ Claimant's later preliminary hearing testimony was that she drove to the work site from Towanda as her coworkers were "hung over" and did not want to drive. P.H. Trans. at 9.

of me. This was for road construction site. Pilot car never slowed. Driver of car had her head down just before impact.⁴

Claimant was transported from the scene to Wesley Medical Center in Wichita, Kansas, via Lifewatch Air Ambulance. She was also seen by her family doctor, as well as respondent's doctor, Dr. Alejandro Vega. On May 28, 2013, Dr. Vega placed claimant on the following restrictions: no prolonged standing or walking, no use of left arm and hand, no bending or squatting, no lifting more than 10 pounds, no driving, and sitting with repositioning.

Dr. David Hufford, a physician specializing in occupational and sports medicine, provided an independent medical evaluation of claimant at her counsel's request on September 3, 2013. Claimant's symptoms included pain in the neck, low back, left wrist, and left knee. Dr. Hufford noted claimant had a previous sleep study as a child but never fell asleep at the wheel or had any other prior motor vehicle collision. Claimant was not ill at the time of the collision. After reviewing claimant's medical history and performing a physical examination, Dr. Hufford recommended physical therapy to the cervical and lumbar spine. Additionally, Dr. Hufford noted that after completion of claimant's pregnancy she should have an MRI of the left knee with subsequent treatment, including physical therapy, corticosteroid injections, and a possible arthroscopic surgery. Regarding claimant's left wrist, Dr. Hufford suggested a reevaluation and possible further treatment, based upon claimant's residual symptomatology. He further noted claimant may require an MRI of the cervical spine if she fails to respond to conservative treatment, which may also require injections and surgical consideration dependent upon the MRI results.

Claimant has a ventriculoperitoneal shunt, located in the right side of her head, which maintains her pseudotumor cerebri symptoms. Claimant testified this condition involves her body producing excess fluid in her head, which the shunt regulates. Claimant stated that she suffers major headaches and blurred vision when she has excess fluid. She explained she knows when her shunt is not working, and therefore does not pass out from her condition. Claimant takes Lortab occasionally for her headache pain, and she indicated to Dr. Hufford she ingested one dose at approximately 7:00 p.m. the night before the incident. She had not taken any medication immediately prior to the accident.

Dr. Hufford opined:

The direct and proximate cause of her injuries is the sudden and immediate impact of her vehicle with a parked semi truck which occurred during the course of her employment. It is my opinion that the primary cause for her altered level of consciousness was fatigue from her work schedule compounded by her pregnancy which resulted in falling asleep at the wheel and leading to this collision. I do not believe that her single dose of narcotic pain medication over 18 hours prior to the

⁴ P.H. Trans., Cl. Ex. 1 at 5 & 9.

collision had any influence in the occurrence nor that there is any other evidence of an underlying sleep disorder or other pathology that influenced this event.

. . .

Is it my opinion that her work schedule resulted in fatigue that eventually led to her falling asleep at the wheel and resulted in a motor vehicle collision that occurred on May 20, 2013. There do not appear to be any other factors of physical illness that have contributed to her fatigue and loss of arousal immediately prior to the motor vehicle collision. Her current pregnancy may have contributed to fatigue but she was only in her late first trimester at the time the collision occurred and this is not the prevailing factor for the loss of arousal that led to the incident in question.⁵

Respondent was unable to accommodate claimant's restrictions. Claimant remains off work since the accident.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

⁵ P.H. Trans., Cl. Ex. 3 at 2-3.

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

Respondent’s primary argument in defense of this claim is that the accident resulted from an idiopathic cause. K.S.A. 2012 Supp. 44-508(f)(3)(A)(iv) specifically excludes accidents or injuries which arise “either directly or indirectly from idiopathic causes.”

Kansas courts historically have interpreted the word idiopathic to mean “of unknown cause.”⁸ In an old law case, the Court of Appeals has used the term idiopathic and phrase personal condition interchangeably by writing “[w]here an employment injury is clearly

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2012 Supp. 44-555c(k).

⁸ See *State v. Massey*, 242 Kan. 252, 258, 747 P.2d 802, 807 (1987), citing *Brain's Diseases of the Nervous System* § 22 (9th ed. 1985); *Principles of Neurology* Ch. 15 (3d ed. 1985); *Comprehensive Textbook of Psychiatry* § 3 (4th ed. 1985).

attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted.”⁹

In this claim, the cause of the accident is known. The claimant stated that it was her belief that she fell asleep.¹⁰ Claimant’s belief is consistent with the statement of Kent McEntire, who told the Highway Patrol trooper that claimant had her head down just before impact.¹¹ Dr. Hufford opined claimant’s work schedule resulted in fatigue that eventually led to her falling asleep at the wheel.

Dr. Hufford’s conclusion is supported by claimant’s uncontradicted testimony. Claimant worked 73 hours the week ending the Friday before the accident. On the day of the accident, claimant left her home at 3:40 a.m. and arrived at the employer’s facility at 4:40 a.m. She then left the employer’s facility at approximately 5:30 a.m. and drove approximately 45 miles to the work site, arriving around 6:30 a.m. Claimant then worked approximately seven and one-half hours with only a five minute break. She was on the clock for approximately nine hours prior to the accident.

In a prior case, this Board Member stated:

[L]osing concentration or falling asleep while driving does not constitute a personal risk or an idiopathic cause within the meaning of K.S.A. 2012 Supp. 44-508(d). Losing concentration while driving or driving without the benefit of enough sleep is a risk common to and distinctly associated with all employments that require employees to drive vehicles.¹²

The same holds true in this case. Claimant was required to wake up early and work long days with few breaks. This Board Member agrees with Dr. Hufford that this type of work schedule would lead to fatigue. Falling asleep at the wheel in this environment is not idiopathic, it is a hazard distinctly associated with claimant’s employment with respondent.

CONCLUSION

Based upon the foregoing, this Board Member finds that claimant suffered an accidental injury arising out of and in the course of her employment with respondent.

⁹ *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

¹⁰ Claimant’s Depo. at 37.

¹¹ P.H. Trans., Cl. Ex. 1 at 9.

¹² *Roush v. Rent-A-Center, Inc.*, No. 1,062,983, 2013 WL 1876358 (Kan. WCAB Apr. 15, 2013).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated September 24, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Brian R. Collignon, Attorney for Claimant
brianc@pistotniklaw.com

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
kdonley@mcdonaldtinker.com
pschweninger@mcdonaldtinker.com

Brad E. Avery, Administrative Law Judge